

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10685-WGY

4
5 AMERICAN ASSOCIATION of UNIVERSITY PROFESSORS, et al,
6 Plaintiffs

7 vs.

8
9 MARCO RUBIO, in his official capacity as
10 Secretary of State, et al,
11 Defendants

12 *****

13 For Hearing Before:
14 Judge William G. Young

15 Preliminary Injunction/Motion to Dismiss

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Wednesday, April 23, 2025

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
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1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE CLERK: Now hearing Civil Action 25-10685, the
4 American Association of University Professors, et al
5 versus Marco Rubio, et al.

6 THE COURT: Good morning. Before we begin, let me
7 say that I have authorized internet access to this
8 proceeding and so I should address those folks who are
9 accessing the proceeding via the internet.

10 You should understand that the rules of court
11 remain in full force and effect, and that is to say you
12 must keep your microphone muted at all times, there is
13 no taping, streaming, rebroadcast, screen shots, or
14 other transcription of these proceedings.

15 With that said, would counsel introduce themselves
16 starting with the plaintiffs' counsel.

17 MS. KRISHNAN: Good morning, your Honor, Ramya
18 Krishnan for the plaintiffs.

19 THE COURT: Good morning.

20 MR. JAFFER: Good morning, your Honor, Jameel
21 Jaffer for the plaintiffs, and I'll introduce my
22 colleagues as well.

23 THE COURT: Sure.

24 MR. JAFFER: Talya Nevins and Cary DeCell. All of
25 us are at the Knight Institute in New York.

1 THE COURT: And good morning to all of you.

2 And for the defense?

3 MR. GRAVER: Good morning, your Honor, Harry
4 Graver for the United States.

5 MS. YEN: And Shawna Yen for the United States,
6 your Honor.

7 THE COURT: And good morning to you all and
8 welcome.

9 I've read all the papers to prepare for this
10 hearing and I've scheduled a hearing on the plaintiffs'
11 motion for a preliminary injunction. I need some help
12 here and I --

13 Well you don't have to jump up first.

14 MS. KRISHNAN: Okay.

15 (Laughter.)

16 THE COURT: Simply because I want to set the
17 stage, and I'm going to ask some discrete questions,
18 primarily for the plaintiffs, but maybe for the defense,
19 and then we'll see where we're going with this case.

20 I can see that this is an important free speech
21 case. The freedom of speech is guaranteed to all
22 persons by the Constitution. It is a freedom to think
23 and to speak, to believe, not to believe, um, without
24 retribution from the government. It's probably the
25 strongest guarantee in American democracy.

1 So, you know, you could say, "Well, that makes
2 this a simple case," but it's anything but simple,
3 because our duly-elected government has the right,
4 indeed the duty, to secure the borders, to, um,
5 proscribe crimes, to proscribe acts of discrimination
6 based upon religious belief or nonbelief, based upon
7 race, gender, ethnic background. It has an important
8 governmental interest in preventing assault and threats
9 of a sort. So it's anything but simple.

10 And I don't mean this critically, but I have
11 various issues, um, the defense properly has raised them
12 in their motion about the complaint, the vehicle, that
13 brings us all together this morning. And it's that I
14 want to ask a few questions about.

15 When I look at what you're -- I'm talking the
16 plaintiffs here. When I look at what the plaintiffs are
17 seeking for the redressability issue, um, I -- I have
18 some real doubt about this Court's ability -- "ability"
19 is the wrong word, this Court's, um, the propriety of
20 this Court, its subject matter jurisdiction, to enter
21 injunctive relief in the manner that the plaintiffs
22 seek, and, um, certainly against the President of the
23 United States. Those are matters to which Congress has
24 spoken and this Court of course scrupulously will follow
25 the law. But if I -- if I look at the gravamen of the

1 complaint that the plaintiffs have drafted, um, I
2 believe I understand it, and that's what I -- that's
3 where my questions are going to.

4 To understand how I can best manage this case, I'm
5 going to ask the plaintiffs some questions about what in
6 fact they've alleged and perhaps the limits. So you
7 frame something that you call an "ideological
8 deportation process," the -- you say it exists, the
9 defendants deny that. It's a factual issue. But it --
10 and don't take it from me, it's your complaint, but as I
11 read it, it alleges, if I have this correctly, that the
12 zealous, you would say, plaintiffs would say
13 "overjealous" enforcement of the laws relating to
14 noncitizens who are found here in the United States
15 chills the, um, First Amendment rights not only of those
16 individuals, but also of the various associations whom
17 you represent. Is that accurate? And if it's not, I
18 invite you to correct me. Not argue. We'll get to that
19 if necessary.

20 Have I got that right?

21 MS. KRISHNAN: So just to be clear, your Honor,
22 you know what we challenge in this case is the adoption
23 and implementation of defendants' policy of --

24 THE COURT: Well they say there is no policy or no
25 unconstitutional policy.

1 MS. KRISHNAN: Well we don't think that the
2 existence of the policy is a close call. With the press
3 and the public, defendants have been clear that this
4 policy exists, that they are --

5 THE COURT: Well, respectfully, um, this Court
6 deals with evidence and it isn't adjudicated on the
7 basis of what the press might think. So I've
8 actually -- I really have tried to identify, with a
9 little more precision, the policy that you're
10 challenging -- or policies.

11 A plaintiff has their own complaint, they're the
12 "master of their own complaint" is the way we usually
13 say it. I'm not trying to cabin you in, I'm trying to
14 understand.

15 So I passed out to everyone, um, two documents
16 that seem that they're authentic -- I think they're
17 authentic, but defense counsel has every right to
18 challenge it. But one of them -- and I'm not really
19 quivering over Homeland Security checking people's
20 social media, but the explanation by the agent of
21 Homeland Security about why they're going about this,
22 um, looks to me like a policy. And then, because I have
23 this, um, society, this Middle Eastern Society, whom you
24 represent, I -- and I'm not -- I don't want to drift
25 into the Harvard litigation, it's not my case, I'm not

1 speaking to it, but more recently there's this letter,
2 which happens to be to Harvard, but I've seen cases like
3 this, I've drawn one of them, where noncitizens have
4 their status, their F-1 visa or the documents that
5 support that abrogated, and in the second document I
6 passed out to you, Homeland Security says, in that
7 letter, one of the defendants here, she says, um,
8 "Unless you do certain things by August -- by April
9 30th, students at Harvard anyway, who are noncitizens,
10 are likely or may have their status changed." So that
11 might be another aspect of a policy.

12 Are those policies -- are those the policies of
13 which you complain?

14 MS. KRISHNAN: Well I think they're evidence of
15 the agency's implementation of the executive orders and
16 all the policy, but I do think the policy is broader
17 than that articulated in the two documents that we've
18 seen. If I could just clarify what we think the policy
19 is and what evidence we rely upon.

20 You know the policy --

21 THE COURT: I will get to what evidence you rely
22 on, that's argument, but what you think the policy is, I
23 do very much want to hear you. Go ahead.

24 What's the policy that you challenge here?

25 MS. KRISHNAN: The policy is of revoking the visas

1 of and arresting, detaining, and deporting, noncitizen
2 students and faculty based on their protected
3 pro-Palestinian advocacy, that's the policy we
4 challenge.

5 (Pause.)

6 THE COURT: So the existential issue in the real
7 world that the policy is focused on is pro-Palestinian
8 advocacy?

9 MS. KRISHNAN: Yes. And then defendants have used
10 a variety of terms to describe the --

11 THE COURT: No, no, I asked you, and you've
12 answered it. You've answered it. So let me -- and I'm
13 not looking for trouble here, but you made mention of
14 the press and the public.

15 Bringing these allegations, there's a darker, um,
16 inference that one could draw from it. You'd have to
17 read your complaint generously to get there, but I've
18 done that at least to ask this question.

19 You could read this -- and I've read all the
20 submissions of the Amici too, as, um, being only a piece
21 of a broader, um, concerted conduct on the part of these
22 defendants, to, um, abrogate First Amendment rights for
23 some of them that inures more power to the President and
24 the senior executive officials. You didn't say that.
25 I'm not asking you to say it. But should I, can I read

1 your complaint that broadly?

2 MS. KRISHNAN: (Pause.) I don't think we --
3 suddenly, you know, there is a broader pattern of
4 conduct here by defendants that we think implicates
5 broadly the First Amendment rights of not only students,
6 but universities. But to be clear, what we are
7 challenging in this case is this policy of deporting
8 students and faculty based on their political viewpoint.

9 THE COURT: Well -- and more specifically their
10 pro-Palestinian expressions?

11 MS. KRISHNAN: That's right.

12 THE COURT: Fine. And now -- and I'm not asking
13 for the proof, but you think you can prove that in a
14 court of law -- this court?

15 MS. KRISHNAN: Yes, we do.

16 THE COURT: Are you ready to?

17 MS. KRISHNAN: Yes.

18 THE COURT: All right.

19 Pursuant to Federal Rule of Civil Procedure 65(a),
20 further hearing on the motion for a preliminary
21 injunction is combined with trial on the merits.

22 When do you want to go to trial? Trial.

23 MS. KRISHNAN: Well I don't think we have to go to
24 trial, I think on this preliminary injunction motion --

25 THE COURT: No. No. Ma'am -- Ma'am, I'm

1 authorized to do what I routinely just did. I'm looking
2 for a trial, a trial on evidence with witnesses.

3 MS. KRISHNAN: Okay.

4 THE COURT: And the Rules of Evidence, so that
5 facts may be found, not simple affidavits or advocacy,
6 no matter how eloquent. I'm looking for proof by a fair
7 preponderance of the evidence. I'm authorized to do
8 that. I just did it. I'm not saying that it has to
9 start tomorrow, indeed you'd call my bluff if you said
10 you were ready to start tomorrow, because I don't think
11 I'm ready.

12 (Laughter.)

13 But -- and I'm trying to be transparent, and I
14 intend to be throughout this entire proceeding. But a
15 trial we're going to have. And if injunctive relief is
16 appropriate at all, it will follow that trial. So one
17 imagines you want it fairly promptly, but you want some
18 time to prepare for the trial.

19 Now I haven't even looked at the defense, and
20 there's much to their motion, which I'm going to treat
21 now as a motion to dismiss. So we'll get to them. But
22 assume that your case is still standing after they've
23 been heard, today or at an appropriate time. Assuming
24 we've got something to try, as you have framed it, and I
25 appreciate that, when do you want to try it?

1 MS. KRISHNAN: Your Honor, could you give me one
2 moment?

3 THE COURT: Of course.

4 (Pause.)

5 MS. KRISHNAN: I think we can be ready within 6
6 weeks.

7 THE COURT: All right.

8 MS. KRISHNAN: I do -- I do just want to, um, make
9 a plea, your Honor, um, for urgent relief in this case.

10 THE COURT: You see -- look, you filed this
11 complaint. When you first filed the complaint, you
12 didn't even ask for a preliminary injunction. So I have
13 no basis for invoking the Rule of Civil Procedure I just
14 invoked, which happens to be my common practice. Have
15 you checked? All right, so we've waited, because you
16 didn't ask me to do anything.

17 Now you filed a motion. You -- with agreement of
18 the defendants, you figured out a briefing schedule
19 that's satisfactory to you. I adopted it. Just as soon
20 as that briefing schedule was over, I have convened this
21 hearing.

22 Now the Court is here to serve -- not serve you to
23 the exclusion of the interests of the defendants, but to
24 serve these litigants, that's my duty, and I'm going to
25 do it. The best way to get at truth is through a trial.

1 Now I'll give you a trial -- not tomorrow, and
2 I'll give you a trial in 6 weeks, if that's what it
3 takes, but it's not "Now we get relief and then we're
4 all on affidavits going around about what the judge
5 said," no, no, no, let's get evidence. Let me be
6 specific, just to point out a problem here and why I so
7 favor a trial.

8 In support of your motion for a preliminary
9 injunction, there's -- there's this whole montage of
10 various news clippings, in essence, um, which I'll
11 presume that they're accurate, but you're going to have
12 to prove that they're accurate, and they, under the
13 Rules of Evidence, constitute admissions by the various
14 senior executive officials and indeed the President of
15 the United States. Here's the problem with them. Again
16 trials are for you to try, not for me, but I don't know
17 that they're complete. I don't know that we have the
18 fullest statement of the particular public official. I
19 don't know that they pass evidentiary muster. I expect
20 that. Not that you have to call these people, I don't
21 expect any of them to be called, though the defense
22 could call them. But I'm not going to, um, require it,
23 certainly they're busy people. And I will accept their
24 admissions as evidence once I know that they are both
25 authentic and complete. That's just one problem. So

1 you've got some work to do to prepare it for trial.

2 Also, this business about "chilling the rights of
3 American citizens," well I expect some evidence of that.
4 I expect witnesses to tell me that. And those witnesses
5 are subject to cross-examination. That's what trials
6 are. Trials reach out for justice in the best way
7 that -- you see my bias here, in the best way that human
8 kind knows. That's what I want, I want a trial. You've
9 given me the basis to order one. I am. Just as fast as
10 you want it.

11 6 weeks? We can tinker with that. But is that
12 reasonable?

13 MS. KRISHNAN: I think so. But we will need to
14 consult with --

15 THE COURT: Of course, but I'm going to propose --
16 I haven't allowed the defense at all. But you go ahead
17 and consult.

18 And, Mr. Graver, I'm on pretty firm ground on the
19 Rules of Civil Procedure so far, but now, when you do
20 this, am I making stuff up? And, um, again I think
21 you'll find me fairly transparent.

22 You're -- there's much to be said about your brief
23 -- much to be said about your brief favorably, I'm
24 favorably impressed by your brief. I propose, since
25 I've collapsed everything with the trial and I've

1 explained why I think it's significant, I'm going to
2 treat your brief like a motion to dismiss, in whole or
3 in part, and we'll give a hearing on that motion to
4 dismiss. You think the whole thing can be dismissed.
5 Don't think I've -- I've made up my mind. I've got
6 problems with that and I'm presuming that something
7 survives.

8 When do you want to be heard on the opposition --
9 well let me start like this. You're okay with that,
10 treating it as a motion to dismiss, I'll give you an
11 oral hearing on it and resolve it? Does that make
12 sense?

13 MR. GRAVER: That's right, your Honor. So I think
14 that for discussing the possibility of a trial, we
15 obviously want a full hearing on the motion to dismiss.

16 THE COURT: And I propose to give you a full
17 hearing.

18 MR. GRAVER: And I think that those -- in our view
19 the complaint suffers from fundamental legal defects
20 that would avoid the need for a trial. But putting that
21 all to the side --

22 THE COURT: It's not the time to argue it, but I'm
23 not surprised you're saying that.

24 Okay. So when would you like to be heard on that?

25 MR. GRAVER: We're prepared to litigate that now.

1 But in any event, I think we can coordinate with
2 plaintiffs' counsel on an agreeable schedule.

3 THE COURT: I'm fine with that. I'm fine with
4 that, um, and now we're talking the language with which
5 I'm familiar. I work for Ms. Belmont. So it's all very
6 well for you folks to coordinate, but I have other cases
7 and I deal with them. So, um, the, um -- excuse me.
8 You'd best propose to her a time for a hearing.

9 Now my own sense is a half an hour a side for
10 argument. I'll allow further briefing. And I'll be
11 prepared.

12 So is that enough guidance to work out when you'd
13 like to be heard?

14 MR. GRAVER: Yes, absolutely.

15 THE COURT: All right.

16 It seems to me we ought to start there, so we know
17 what if anything we're going to try.

18 MS. KRISHNAN: Um, generally, your Honor. And I
19 am prepared to address the jurisdictional arguments
20 today if the government wants to proceed on its motion
21 to dismiss.

22 THE COURT: Well the question is do you want to
23 have a little more time to think about it in its current
24 posture or argue it now? I'm prepared too. But it's
25 not a question of lack of preparedness, it's do you want

1 to discuss and pick a time when we focus just on that,
2 treating their opposition as a motion to dismiss? You
3 tell me.

4 (Pause.)

5 MS. KRISHNAN: I think I'm prepared to move
6 forward now.

7 THE COURT: The government?

8 MR. GRAVER: Yeah, absolutely.

9 THE COURT: Very well.

10 So here's what we'll do. We'll take a brief
11 recess, 10 minutes. We'll treat this as a motion to
12 dismiss. The defendants will argue first, then the
13 plaintiffs will argue, and I will see what I think.
14 We'll stand in recess for 10 minutes.

15 We'll recess.

16 THE CLERK: All rise.

17 (Recess, 10:30 a.m.)

18 (Resumed, 10:40 a.m.)

19 THE COURT: All right. You'll understand I have
20 read all the papers. Mr. Graver, I will hear you, sir.

21 MR. GRAVER: Thank you, your Honor.

22 So switching to a motion to dismiss hearing, I
23 think that -- well what I want to emphasize is four --
24 or I think at least three fundamental defects that I see
25 in the complaint that I think obviates the need for a

1 trial and that counsels in favor of dismissing the
2 complaint now.

3 First and foremost is the INA. And taking a step
4 back, at a high level the entire purpose of the INA's
5 many jurisdiction-stripping provisions is that the
6 federal courts do not interfere with immigration
7 proceedings until those proceedings have completed, they
8 have culminated in a single petition for review, that
9 then goes not to the District Courts, but to the Court
10 of Appeals.

11 THE COURT: I'm familiar with that.

12 MR. GRAVER: That's all still table-setting for
13 the moment.

14 THE COURT: No, it's perfectly all right. When
15 the Real ID Act was passed, I wrote a case, you might
16 look at it, ***Inwanhu vs. Shirtak***. I do know what the law
17 is. At least generally.

18 MR. GRAVER: So speaking from a 30,000 foot
19 account of the law, the big problem here that I at least
20 see is that every single aspect of this suit is
21 essentially a collateral attack on those proceedings in
22 conflict with the jurisdiction-stripping regime that
23 Congress established. Here the plaintiffs seeks
24 categorical relief, they seek relief with respect to an
25 innumerable class of aliens, whereas the INA insist on

1 individualized adjudications and individualized
2 remedies.

3 The other piece is that the complaint too -- the
4 only way in which I think this works for addressability
5 purposes is essentially asking this Court for a
6 prophylactic injunction, that's the only way in which
7 they have Article III standing. That if you enjoin a
8 whole class of immigration proceedings from even taking
9 place, or even starting in the first place, that runs
10 headlong into the INA's jurisdictional bars.

11 So I think that in order for the suit to make
12 sense, in order for it to go forward, this Court needs
13 to then run through a number of hurdles that the INA has
14 established. So the INA, I think, is Category Number 1.

15 Category Number 2 is Article III standing. We
16 raise a number of arguments in the brief. One of which
17 I think maybe warrants a little bit more attention is
18 the **United States vs. Texas** point. And I think that is
19 taking all the allegations as true, forget the facts,
20 the evidence at trial, there's just a fundamental legal
21 problem with their path of standing.

22 And that problem is what Texas held is that third-
23 parties do not have a cognizable Article III interest in
24 how the executive branch structures its enforcement
25 priorities. So there -- and just cut me off if this is

1 also recabining, but what Texas challenged was actually
2 enumerated enforcement guidelines that they said
3 unlawfully prioritized enforcement against a certain
4 class of aliens. Without even reaching the merits, the
5 Supreme Court held that claim ends for Article III
6 reasons alone. And I think the exact same thing is true
7 here.

8 Again what my friends are not challenging is any
9 actual source of legal authority, they're not
10 challenging the INA, at least in the complaint that's
11 the theory, they're not directly challenging the
12 President's executive orders, they disclaim that in
13 their papers. Instead what they're challenging is
14 whatever you define this amorphous policy to be, it's an
15 enforcement priority, it's how you structure and how you
16 use your existing resources to fulfill whatever the
17 agenda is of the executive.

18 THE COURT: Well isn't it, um -- not so much as
19 priorities, the President's priorities, but the effect
20 of the conduct of the President and his senior executive
21 officers' agents in implementing them, the manner in
22 which they implement them, the manner in which they
23 apply it. And can they not challenge that?

24 MR. GRAVER: And that's the square holding of
25 **Texas**. I mean the point that you were just raising is

1 exactly what Justice Alito emphasized in dissent. There
2 everyone agrees that the canonical Article III injury is
3 pocketbook harm.

4 Texas was suffering and no one doubted that Texas
5 was suffering significant financial incidental harms as
6 a result of how -- as a result of the enforcement
7 guidelines that the executive branch then chose to
8 adopt. But the Supreme Court held that those incidental
9 harms, albeit real, are not cognizable Article III
10 injuries in this context.

11 The exact same thing is true here even though the
12 incidental harm has a constitutional dimension. There's
13 no Article III difference there. So I think this just
14 runs straight through ***United States vs. Texas***, the 2023
15 version, I realize there are many.

16 THE COURT: Okay.

17 MR. GRAVER: So those are the two, I think,
18 jurisdictional difficulties that this Court has to go
19 through before we get to -- into the realm of a trial.

20 The other piece of this -- and this goes a little
21 bit more to the merits, is that the way in which the
22 present complaint is structured -- and if they want to
23 amend it, that would be their prerogative. But the way
24 in which the present complaint is structured is a facial
25 challenge to whatever this amorphous policy may be. And

1 I read the complaint the same way that I think that your
2 Honor did, or at least as you were walking it through
3 before, which is that you have this general policy that
4 seems to be focused on pro-Palestinian or pro-Hamas
5 political activity, and in some instances what you have
6 is, as you put it, "overzealous" enforcement,
7 essentially excesses of a policy in some manner, but
8 that is almost by definition not what is amenable to a
9 facial challenge, not amenable to an across-the-board
10 challenge.

11 What the Supreme Court explained in **NetChoice** is
12 that for the kind of First Amendment claim they have
13 chosen to bring here, what plaintiffs' burden is -- and
14 this is a legal burden, not a factual burden, is showing
15 that the policy at issue has no legitimate sweep, no
16 legitimate sweep, and I think that's impossible here for
17 the reasons we detailed in the papers.

18 First and foremost is that, as you identified in
19 the -- where is it? The Homeland Security memorandum,
20 as is true in the cites that my friends put in their
21 complaint, as is in our declarations, as is in the
22 President's executive order, what these policies or
23 actions or guidance target, within their four corners,
24 is unlawful conduct, it's antisemitic harassment, it's
25 violence, and you can see that again and again and again

1 in the papers you printed for us. That lawful core is
2 sufficient, which no one I think contests, no one says
3 it's unlawful, and that defeats the --

4 THE COURT: I - I -- I understand we're drifting
5 into the meat of the complaint, but, um, I did note the
6 difference in "tone," if you will -- not in "tone," the
7 difference in language, the plain and ordinary meaning
8 of the language of the President's executive orders, and
9 the, um, the documents that I posited were examples of
10 Homeland Security's policy.

11 The difference between that and the, um -- and I
12 want to choose my language with care, the sometimes more
13 strident language of the senior executive officers, or
14 their agents, which don't seem so tethered. You follow
15 that what I'm saying. That are not tethered to violent
16 antisemitism, but just talk about it generally. And,
17 um, they're evidence that, when that comes from these
18 senior officers of our government -- and not to exclude
19 the President himself, um, that that unconstitutionally,
20 with all circumstances -- this is a motion to dismiss,
21 all the circumstances, that that chills the speech of
22 Americans.

23 MR. GRAVER: So I think --

24 THE COURT: Can't they come into court and have
25 that adjudicated?

1 MR. GRAVER: So I think two points, your Honor,
2 um, maybe one first on standing and one on the merits.

3 The first on, at least the standing point, is what
4 I would caution against, is exactly what the Supreme
5 Court cautioned against in **Murthy**, which is not to
6 "treat the government as a monolith," and that's Justice
7 Barrett's phrase.

8 And essentially what happened there is the states
9 pressed a very similar theory of standing. They
10 collected statements by someone over here, actions by
11 another person over there, something else by a third,
12 bundled that all together and said the collective force
13 of this is having downstream effects on speech.

14 What Justice Barrett said is that that does not
15 work especially in the third-party standing context
16 here, you need what she called "specific causation," you
17 need to target -- identify a specific injury traceable
18 to a discrete identifiable governmental act. So I would
19 caution against the impulse, which I think this
20 complaint rests on, which is bundling it all together
21 and resting it there at 30,000 feet.

22 The other point -- and this is something too that
23 I think, um, this more goes to the merits, but something
24 too that had been pulled out of the papers, if we had
25 more space, is that there's a fundamental mismatch here

1 between I think the right that Americans are able to
2 raise in this context and the remedy that plaintiffs
3 need in order to have standing. And the key points -- I
4 would point to the Supreme Court's decision in **Munoz**
5 from 2024 which clarified its prior decision in **Mandell**.

6 What the Supreme Court said is that, yes, it is
7 possible that Americans have substantive -- wait a
8 minute, Americans' substantive constitutional rights may
9 be burdened by immigration proceedings, much as they may
10 be burdened, for that matter, by a criminal trial, or
11 something of that sort. But the Court says they're very
12 concerned about essentially allowing those incidental
13 injuries to collaterally attack and upend the entire
14 immigration system, which I think is pretty intuitive
15 how that might happen if that theory of standing became
16 boundless.

17 So what the Court established in **Mandell**,
18 reiterated in **Trump vs. Hawaii**, and held in **Munoz**, is
19 that what American citizens whose First Amendment rights
20 are burdened are entitled to is a facially legitimate
21 and bonified explanation, which as the Court clarified
22 in **Trump vs. Hawaii** is limited to a statutory cite
23 alone.

24 I think that is significant for present purposes,
25 for jurisdictional purposes, because the redress that my

1 friends need in order to have Article III standing
2 extends well well well beyond what their constitutional
3 right entitles them to. Their constitutional right
4 entitles them to at most a facially legitimate and
5 bonified explanation. What they're asking for is a
6 prophylactic injunction that shuts down much of the
7 immigration system as applied to a certain class of
8 people. So I think that's just another, um, again
9 fundamental defect that rests with the complaint.

10 The theme -- the last point I just wanted to make
11 is I think these are not necessarily issues that get
12 ironed out by factual developments, these are legal
13 defects, because I think the complaint -- and to borrow
14 something that Judge Casper said in one of -- and this
15 is in **Greater Boston Legal Services**, one of the cases my
16 friends cite, is that, um, what -- yes, here we go, I'll
17 get the quote.

18 (Turns pages.)

19 You know it's a good quote and I had it, but now
20 it's gone.

21 (Pause.)

22 Okay, here we go. "A plaintiff cannot attach a
23 policy label to their own amorphous description of
24 agency practices and create a case and controversy." I
25 think that is the fundamental defect of this complaint,

1 I think that permeates each aspect of it. To the extent
2 that the plaintiffs want to bring as-applied challenges
3 to what they deem are excesses of this amorphous policy,
4 that is the proper way that these can get adjudicated,
5 and we can fight about that there, but I think this
6 rests at too high a level of generality and involves too
7 many jurisdictional hurdles to merit going any further
8 than a motion to dismiss.

9 THE COURT: Thank you.
10 Counsel?

11 MS. KRISHNAN: Thank you, your Honor.

12 THE COURT: I should call you by name, and forgive
13 me. Your name again? I'm sorry.

14 MS. KRISHNAN: Not at all. It's Ms. Krishnan.

15 THE COURT: Yes, Ms. Krishnan. I'll hear you.

16 MS. KRISHNAN: The government started with the
17 INA, so that's where I will start as well.

18 I don't think your Honor has to resolve the
19 1252(f)(1) question on the motion to dismiss. The
20 Supreme Court made clear, in **Biden vs. Texas**, that
21 (f)(1) is not a limit on jurisdiction, it goes only to
22 the scope of relief the District Courts and Circuit
23 Courts can afford in any particular case. So it doesn't
24 go to jurisdiction.

25 And as to the government's complaint that 1252(g)

1 controls, and as our reply brief explained, we think
2 there are three reasons why 1252(g) is not a bar to
3 plaintiffs' claims in this case.

4 The first is that the claims are not by or on
5 behalf of an alien. Plaintiffs here assert the First
6 Amendment rights of their citizen members and of the
7 organizations themselves, and the Supreme Court has made
8 clear that listener rights under the First Amendment are
9 distinct from and independent of any rights that a
10 willing speaker might possess.

11 THE COURT: Is he not right though that
12 fundamentally this is an attack on the operations of the
13 INA?

14 MS. KRISHNAN: I don't think so. What the Court
15 has made clear about 1252(g) is that it strips
16 jurisdiction only over the three specific enforcement
17 actions mentioned in the declaration. So the AD's
18 decision to commence proceedings, the decision to
19 adjudicate cases, and the decision to execute removal
20 orders. And that's what the Court said in *Vullo*, that's
21 what a plurality of the Court said in *Jennings*.

22 And what the Court has made clear, and what the
23 First Circuit I think has also made clear in cases since
24 then, is that 1252(g) does not bar challenges to, for
25 example, policy choices, like the one at issue in this

1 case that we've alleged in our complaint, and even where
2 those policy choices might have downstream consequences
3 for removal.

4 So I think the Supreme Court's decision in **Regents**
5 is directly on point here, um, that involved a
6 rescission of DACA. And the government made a similar
7 argument in that case, an argument that the memorandum
8 rescinding DACA in that case should be construed as an
9 initial decision to commence proceedings, and that was
10 an argument that the Court effectively rejected in
11 holding that 1252(g) did not control.

12 And one final point I want to mention on 1252(g),
13 is that I think that a cannon of constitutional
14 avoidance counsels strongly in favor of rejecting the
15 government's claim here.

16 The government argues that any claims here should
17 be bundled into a petition for review, um, that could
18 ultimately be heard by the Court of Appeals. But that's
19 just not an avenue that is open here, because plaintiffs
20 are asserting the First Amendment rights of their
21 citizen members and their own rights as U.S.-based
22 organizations. So if they can't raise their claims
23 here, they have no forum to raise those -- in which they
24 can raise those claims.

25 And what the Court has -- the Supreme Court has

1 said in cases like **Underbasin** is that a serious
2 constitutional question would arise if an agency statute
3 were interpreted to foreclose all judicial review of a
4 colorable constitutional claim of the kind that we
5 raised here. And so for those reasons we don't think
6 1252(g) applies in this case.

7 On standing, um, my friend mentioned **Murthy**. The
8 plaintiff's theory of standing in that case faltered for
9 two reasons, neither of which I think applies in this
10 case.

11 So the first reason is that the plaintiff in that
12 case didn't identify any specific speakers from which
13 they wanted to hear from. We have. The record is
14 replete with examples of plaintiff citizen members being
15 denied the inside suspected engagement of specific
16 noncitizens on topics related to Israel and Palestine.

17 The second reason that my friend alluded to was
18 that there wasn't a clear chain of causation in that
19 case, it was highly attenuated by the fact that the park
20 homes in that case had independent incentives to
21 moderate the content at issue. And there was good
22 evidence in fact that the park homes would continue
23 taking down this content whether or not the government
24 pressured them to do so, and that was fatal in that
25 case.

1 Here there is a clear chain of causation. The
2 noncitizen speakers that we pointed to have stopped
3 speaking because of the policy, and that is the entirely
4 predictable effect of the policy that we've alleged. So
5 **Murthy** we don't think controls.

6 On **United States vs. Texas**, that case is not
7 apposite, that case was about nonenforcement decisions,
8 it involved claims that the executive branch should make
9 more arrests, more prosecutions, and the majority in
10 that case said, "Well this is a standing question that
11 almost never arises." And so this is not -- that case
12 we don't make any claim that the government should be
13 making more arrests, more prosecutions, since we're not
14 intruding on its discretion in the way that the state's
15 claims in that case did.

16 Um --

17 THE COURT: Is that -- that's how you distinguish
18 it?

19 MS. KRISHNAN: Well I think that that is the way
20 to distinguish it.

21 THE COURT: I accept that you do. I mean I just
22 -- I'm asking. Go ahead.

23 MS. KRISHNAN: The majority there made clear that,
24 um, the case there was rare, it was a set of
25 circumstances that almost never arises, because what

1 they were challenging was nonenforcement decisions. And
2 I think that that does distinguish this case.

3 And my friend then -- and I would also just
4 mention, before I move on, that I think accepting the
5 government's broader interpretation of that case would
6 foreclose any challenge to immigration enforcement
7 policies, and that's quite obviously not the case. I
8 mean you could even see the **Regents** case as a challenge
9 to an immigration policy. But the Court didn't hold
10 that the plaintiffs there lacked standing, um, because
11 it would intrude on enforcement priorities.

12 So now I want to just touch on the merits because,
13 um, because my friend touched on the merits too.

14 And so on this question of whether the policy
15 exists -- obviously now we're on a motion to dismiss.
16 We think we've done enough to plausibly allege the
17 existence of this policy. We think that the Court can
18 take into consideration the, um, the various public
19 statements, um, judicial notice of the public statements
20 made in the news clippings that we have appended to the
21 --

22 THE COURT: I'm not so sure that's right. But,
23 um, I think I would say it in a different way. I'm not
24 so sure I can take judicial notice of news clippings. I
25 do think that the statements of senior executive

1 officials, and the President, who are in their official
2 capacities named as defendants here, and others acting
3 under their authority and at their direction, um, are so
4 closely intertwined with your complaint that on a motion
5 to dismiss I am prepared to accept that these people
6 said at least these -- I raised an issue when I was
7 talking about completeness, but I'm prepared to accept
8 that these people, as identified in the press, said
9 these things. It's as though you allege that in your
10 complaint. I think that's different than judicial
11 notice. But, um, that's a minor point. So, yes, as I
12 reflect on this, those will be before me.

13 Go ahead.

14 MS. KRISHNAN: Thank you, your Honor.

15 So the government has denied the existence of the
16 policy. That denial isn't credible. There are a
17 mountain of statements of the kind that --

18 THE COURT: But I can't make credible -- I can't
19 make credibility determinations. I just said that I'm
20 going to accept that you pled that the people you have
21 named, in their official capacities, have said the
22 things that I have before me, and their agents -- and
23 I'm drawing inferences, but they're reasonable
24 inferences in favor of the plaintiffs, have likewise
25 said things.

1 Let me jump to a concern that I have that you
2 haven't addressed.

3 I have real problems with your claim of lack of
4 due process in the absence of statute or regulation to
5 which you can -- against which you can press. I'm not
6 finding cases that guide me here.

7 MS. KRISHNAN: Our due process claims, the
8 vagueness claims that we, um, make in the complaint is
9 intertwined I think with our First Amendment claim.
10 There are cases where courts have applied the void-for-
11 vagueness doctrine to agency policies, we've cited some
12 of those in our reply brief. And the Court --

13 THE COURT: But really it's hard for me to say,
14 "Well this policy is void for vagueness" when the
15 responsible official says "Well there is no policy." So
16 the policy they deny is void for vagueness?

17 MS. KRISHNAN: Well on a motion to dismiss, I mean
18 I -- we think we've done enough to plausibly allege the
19 existence of this policy. So assuming that's true, um,
20 our argument on vagueness is that, um -- and again the
21 policy here is of deporting students and faculty on the
22 basis of their pro-Palestinian advocacy. The outer
23 limits of what defendants here consider to be
24 pro-Palestinian advocacy of the kind that might subject
25 you to deportation I think is insufficiently unclear,

1 particularly given the First Amendment rights, the
2 important First Amendment interests at stake here, and
3 that is just the core of a void-for-vagueness claim.

4 And so just to, um, make -- to support our
5 argument that defendants have -- sorry, that we have
6 plausibly alleged the existence of a policy, the
7 statements that we would point to -- and some of these
8 are alleged in our complaint, um, is we think the
9 initial statement of the policy was made by Secretary
10 Rubio on March 9th when he tweeted, quote, "We would be
11 revoking the visas and/or green cards of Hamas
12 supporters in America so they can be deported."

13 In a series of statements that have been made
14 since then -- again many of them are included in our
15 complaint, they've made clear that they regard a broad
16 spectrum of pro-Palestinian speech, including antiwar
17 speech, to constitute support for Hamas.

18 And so you have, for example, the March 13th
19 interview given by the Deputy Secretary of DHS, Troy
20 Edgar, in which he was asked "Why Manuel Pelio was
21 deported?" And he initially said "Support for Hamas."
22 When asked, "How did Pelio support Hamas?" Edgar said,
23 "he put himself in the middle of basically
24 pro-Palestinian activity."

25 And then on March 28th, Secretary Rubio provided

1 -- um, made remarks to, um, "Meet the Press," in which
2 he was asked whether all recent student revocations
3 were, quote, "related to pro-Palestinian protest"? And
4 at that time I think around 300 student visas had been
5 revoked. And Rubio said in response, quote, "I think
6 there might be a few that are not, some are unrelated to
7 protest and are just having to do with criminal
8 activity." And we think that that statement too was a
9 clear acknowledgement that they are revoking visas and
10 green cards on the basis of pro-Palestinian speech.

11 But of course we don't just point to statements
12 that have been made by defendant officials, we also
13 point to actions that they have taken that we allege
14 show that they are implementing the policy.

15 So we point to, for example, the fact that they've
16 attempted to deport many students and faculty explicitly
17 based on their, um, perceived pro-Palestinian or
18 anti-Israel expression. We point to the fact that
19 they're supplying universities with the names of
20 students that they want to target. We've also pointed
21 to the fact that they're trying to identify additional
22 targets including by launching new social media
23 surveillance and asking some number of university
24 students for the names and nationalities of
25 pro-Palestinian protesters. And so we think that we've

1 done enough in the complaint to plausibly allege the
2 existence of this policy.

3 On the question of, um, whether we have, um,
4 plausibly alleged a First Amendment -- stated a First
5 Amendment claim, the government argues that we haven't,
6 largely I think based on this misassumption that what
7 we're challenging in this case are the two executive
8 orders that have been issued by the President. That's
9 not what we're challenging, we're challenging the policy
10 that defendant agencies have adopted to implement those
11 executive orders. And the policy, as we've stated it,
12 is about targeting people based on political viewpoint.

13 So I think, you know, it's clear that if you
14 accept, um, on the motion to dismiss, that we've
15 plausibly alleged that policy, um, then I don't see how
16 the government can possibly show, um, that that policy
17 had any plain illegitimate sweep. We've certainly done
18 enough to show that it's unconstitutional in a
19 substantial number of its applications, which is the
20 test that applies when the First Amendment is at issue.

21 And --

22 THE COURT: Do you wish to say a bit about
23 standing here?

24 MS. KRISHNAN: Yes.

25 So I mean earlier I distinguished, um, **Murthy**,

1 which I think is the case that they primarily rely upon
2 to show that, um, we lack standing in this case. And we
3 think that the complaint includes, um, lengthy
4 allegations which establish that plaintiffs and their
5 citizen members are experiencing real serious and
6 concrete harms. We've identified 16 citizen members by
7 name, each of those citizen members identify specific
8 noncitizens that they have been unable to hear from and
9 engage with because of the policy.

10 And with respect to the plaintiff organizations,
11 um, we have alleged that, um, they have been harmed both
12 by having to divert resources away from their core
13 mission of promoting academic freedom and posturing
14 scholarly engagement, to instead, um, protecting their
15 member safety, for example, by connecting individual
16 noncitizen members with, um, legal support, because they
17 fear or are at imminent risk of deportation because of
18 their speech.

19 We also point to the fact that, um, many
20 noncitizens have been deterred from joining these
21 organizations in the first place, and that particularly
22 harms chapters like the Harvard Chapter, which is a new
23 chapter, and that many members have been deterred from
24 participating in events which, um, then disable these
25 organizations from being able to represent effectively

1 the interests of all of their members. And that is
2 sufficient to establish their standing as organizations
3 themselves.

4 THE COURT: Thank you.

5 I do thank you both, this has been very helpful to
6 the Court. I deeply appreciate your skill and
7 professionalism, both of you, in stepping up so
8 promptly. I'm taking the matter under advisement.

9 So let's just analyze for a moment at least the
10 possibilities that occur to me. You should take no --
11 draw no inference from this whatsoever.

12 I can see, um, three possibilities under the Rules
13 of Civil Procedure. One, treating this as a motion to
14 dismiss, I can grant the motion and dismiss the case
15 with prejudice. The plaintiffs of course have the right
16 then to appeal to the Court of Appeals.

17 I can, um, dismiss the case, but without
18 prejudice, and the plaintiffs then, consistent with the
19 Rule 11 good-faith pleading, could have the opportunity
20 to amend to deal with issues that the Court thinks are
21 at least addressable.

22 I could, third, um -- well I guess there are four.
23 I could allow the motion in part and deny it in part.

24 Or I could deny the motion.

25 For the moment it's appropriate to say, with the

1 motion to dismiss, "sub judice," as they say, "under
2 advisement," um, there'd be no discovery. Again, having
3 collapsed this proceeding with trial on the merits, um
4 -- and this is another one, Mr. Graver, I'm making up,
5 the parties will understand that I will take it that the
6 defendant officials have denied -- without the necessity
7 of filing a particular pleading, though you're welcome
8 to, have denied all the substantive factual allegations
9 of the complaint. So everything that is a substantive
10 factual allegation is taken to be denied.

11 If any of this survives -- and the Court will
12 enter a written order, that order will be followed by a
13 prompt status conference, because we need to discuss, as
14 professionals, how we're going to address the issues of
15 a trial. In my mind they're not insurmountable at all,
16 but we need a case-management conference. I'm not
17 signaling anything, but if you get an order and anything
18 survives, it will be immediately followed by a status
19 conference and we can talk further.

20 I was going to say that I look forward to working
21 with you, but that may tip the Court's hand, and I do
22 not mean that in any respect, so I'll say thus far it
23 has been a pleasure. And I mean that professionally,
24 working with you, your arguments have been helpful to
25 the Court professionally. I deeply appreciate them. I

1 take the matter most seriously and I will be working on
2 it.

3 But before I recess, are there any questions as to
4 where we stand here? I'm taking it under advisement.

5 Ms. Krishnan?

6 MS. KRISHNAN: No, I don't think so. Thank you.

7 THE COURT: Mr. Graver?

8 MR. GRAVER: No, your Honor.

9 THE COURT: And thank you. Thank you all.

10 I appreciate it. We'll take it under advisement.

11 We'll recess.

12 THE CLERK: All rise.

13 (Ends, 11:15 a.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Wednesday, April 23, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 04-30-25

RICHARD H. ROMANOW Date